

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Linh Hoang Nguyen

VISA APPLICANTS: Mr Thanh Trieu Vo
Mr Trieu Dai Quang Vo
Ms Trieu Gia Quyen Vo

CASE NUMBER: 1413661

DIBP REFERENCE(S): OSF2014/026113

MEMBER: Susan Trotter

DATE: 18 December 2015

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first-name visa applicant meets the following criteria for a Subclass 309 (partner (Provisional)) visa:

- Clause 309.211 of Schedule 2 to the Regulations.
- Clause 309.221 of Schedule 2 to the Regulations.

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Statement made on 18 December 2015 at 5:26pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. The visa applicant, Mr Thanh Trieu Vo, is currently 46 years of age and is a citizen of Vietnam. He married the review applicant, Ms Linh Hoang Nguyen, who is currently 35 years of age, on 22 May 2013.
2. Mr Vo's son, Trieu Dai Quang Vo, and his daughter, Trieu Gia Quyen Vo, are the secondary applicants in this matter.
3. On 7 January 2014, Mr Vo applied for a Partner (Provisional) Class UF visa in respect of himself and his son and daughter under section 65 of the *Migration Act 1958* (the Act) on the basis of his relationship with Ms Nguyen.
4. On 30 July 2014, a Departmental delegate of the Minister for Immigration refused to grant the visas on the basis that they were not satisfied that Mr Vo and Ms Nguyen were in a genuine and continuing relationship as required.
5. Ms Nguyen lodged an application for review of the delegate's decision with the Tribunal on 8 August 2014.
6. The hearing took place on 20 October 2015. Ms Nguyen appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from Mr Vo and his son, Trieu Dai Quang Vo, in person. Ms Nguyen's mother and Mr Vo's mother, both of whom were visiting from Vietnam, also attended the hearing as support persons for Ms Nguyen and Mr Vo.
7. The Tribunal was assisted by an interpreter in the Vietnamese and English languages.
8. Mr Vo was represented in relation to the review by his registered migration agent.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

ISSUES

10. Partner visas involve a two stage process. The visa applicant must hold a provisional visa in order to be granted a permanent visa. The grant of the provisional visa enables the visa applicant to travel to and remain in Australia on a temporary basis. The grant of a permanent visa may subsequently be considered, and generally depends on whether the relationship has continued for a period of at least two years.
11. At the time the visa application was lodged, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). Relevantly to this matter the primary criteria include clause 309.211 and clause 309.221.
12. Clause 309.211(2) requires that at the time the visa application was made the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case Mr Vo claims to be the spouse of Ms Nguyen who is an Australian citizen¹.

¹ The Tribunal has sighted a certified copy of Ms Nguyen's Certificate of Australian Citizenship dated 28 July 2010.

13. Clause 309.221 requires that the visa applicant continue to satisfy the clause 309.211 criteria at the time of decision.
14. 'Spouse' is defined in section 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: subparagraphs 5F(2)(a)-(d).
15. In forming an opinion as to these matters required for subparagraphs 5F(2)(a)-(d), regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in regulation 1.15A, which is extracted in the attachment to this decision.
16. It follows that the issues to be determined by the Tribunal are:
 - (a) Was Mr Vo the spouse of Ms Nguyen at the time of application?, that is:
 - (i) were the parties validly married²?; and
 - (ii) were the other requirements for a spousal relationship met³?, and, if so,
 - (b) Did the clause 309.211 criteria continue to be satisfied at the time of decision?

CONSIDERATION OF CLAIMS AND EVIDENCE

17. Ms Nguyen provided documentation to the Department and the Tribunal in relation to the parties' relationship, including statutory declarations from friends and family, photographs of their engagement and wedding celebrations and various financial documentation.
18. The Tribunal accepts the evidence before it as summarised where relevant in these Reasons.
19. **Background**
20. Following an earlier trip to Australia as a tourist, Mr Vo arrived in Australia as a student guardian for his son, Trieu Dai Quang Vo, in May 2009. He has since had five short trips back to Vietnam and he is currently lawfully in Australia on a 580 student guardian visa which ceases on 31 December 2017. He currently lives with Ms Nguyen and his son, Trieu Dai Quang Vo, in a three bedroom rented home in Inala, Brisbane. Mr Vo's daughter, Trieu Gia Quyen, is currently living with family in Vietnam.

² section 5F(a) of the Act

³ section 5F(b)-(d) of the Act

21. Formation and development of the relationship

22. The Tribunal accepts the evidence of both parties that they first met in September 2010 at the Inala Shopping Centre. They were initially friends as Mr Vo was married at the time. His wife and daughter had remained in Vietnam whilst he came to Australia as guardian for his son who was studying in Australia. In late 2011 his now ex-wife advised him that she was applying for dissolution of their marriage and he had to attend Vietnam in February 2012 for the formal proceedings for their divorce. Ms Nguyen was in Vietnam at around the same time and they saw each other whilst there, although only as friends at that time. When he told Ms Nguyen of his divorce, they became closer, their relationship changed and they began dating. They commenced living together in Australia on 20 March 2012 and have lived together since. They had an engagement ceremony in Australia on 8 September 2012 followed by a traditional wedding ceremony in Vietnam on 22 December 2012. They then married at Inala in Brisbane on 22 May 2013.

23. Issue 1 – Was Mr Vo the spouse of Ms Nguyen at the time of application?

24. Were the parties validly married?

25. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship.
26. The parties were married on 22 May 2013 at Inala in Brisbane. The marriage was both parties' second marriage. The Tribunal has sighted a translated and certified copy of Mr Vo's Divorce by Mutual Consent dated 10 February 2012 in relation to his marriage to his first wife. The Tribunal has also sighted a certified copy of Ms Nguyen's Federal Magistrates Court of Australia Certificate of Divorce dated 1 December 2009. The Tribunal is satisfied that there was no impediment to Mr Vo marrying Ms Nguyen on 22 May 2013. Further, the Tribunal has sighted the parties' Certificate of Marriage dated 22 May 2013 and is satisfied on the evidence that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by subparagraph 5F(2)(a), and were married at the time of the visa application on 7 January 2014.

27. Were the other requirements for a spousal relationship met?

28. The Tribunal also considered the matters to which it is required to have regard, pursuant to regulation 1.15A, in considering whether the other requirements for a spousal relationship were met.

29. Financial aspects of the relationship

30. The Tribunal accepts the evidence of both parties that at the time of the visa application they were residing together, and had been for nearly two years, and had since that time pooled finances and expenses in all respects. The Tribunal notes that the documents provided by Ms Nguyen, including bank statements, pay slips, car registration documents, insurance documents and other financial documents were all corroborative of the stated relationship between the parties. The Tribunal is satisfied that the evidence as to the financial aspects of the parties' relationship is consistent with the parties' claimed relationship at the time of application.

31. Nature of the household

32. The Tribunal accepts that the parties have shared a household since 20 March 2012 with Ms Nguyen being the income earner and Mr Vo undertaking most household duties. The

Tribunal has sighted copies of tenancy documents and is satisfied that the living arrangements and sharing of household duties at the time of the visa application was consistent with the parties' claimed relationship at that time.

33. *Social aspects of the relationship*

34. Numerous statutory declarations were provided to the Department and the Tribunal from family and friends of the parties acknowledging their recognition of the parties as being in a married relationship at the time of the visa application. Further, numerous photographs have been provided to the Tribunal of the parties socialising with family and friends including at their two engagement ceremonies and at their wedding ceremony.
35. The Tribunal is satisfied that at the time of the visa application the parties represented themselves to their family and friends as being married and that their family and friends were of the view that the parties were in a genuine relationship. Further, the Tribunal is satisfied that at that time the parties had undertaken numerous joint social activities together with family and friends.

36. *Nature of persons' commitment to each other*

37. At hearing the Tribunal put a number of matters to Ms Nguyen⁴ in relation to information before the Tribunal which suggested that she was in a relationship with a Mr Le at the same time as, on her evidence to the Tribunal, she was in a relationship with Mr Vo.
38. Ms Nguyen told the Tribunal that following the breakdown of her marriage to her first husband, she was introduced to her friend's brother, Mr Le and she agreed to sponsor him to Australia so they could marry. She signed documents in early 2012 at the request of Mr Le's sister and visited Mr Le in Vietnam in January 2012. She also saw Mr Vo in Vietnam at this time but they did not travel together as at that time they were only friends. She began to realise that Mr Le did not have any true feelings for her and that he just wanted to marry her to obtain permanent residency in Australia. When Mr Vo learned that his now ex-wife was applying for dissolution of their marriage they became even closer. Mr Vo's divorce was finalised on 10 February 2012 and they then began dating and moved in to live together in Australia on 20 March 2012. Despite Ms Nguyen telling Mr Le on a number of occasions that she no longer wanted to be in a relationship, without her knowledge he lodged a partner visa application in November 2012. She only learned that this had occurred when she received a letter from the Department about that visa application being refused. . In 2013 she received legal advice that she needed to formally withdraw her sponsorship for Mr Le and she wrote to the Department on 3 May 2013 to withdraw her sponsorship for Mr Le.
39. Following the hearing, Ms Nguyen provided a statutory declaration to the Tribunal stating, amongst other things, that she signed some documents at the request of Mr Le's sister, which she did not read, and which were not at the time dated, because she trusted her friend, Mr Le's sister. She further agreed that she had attended a party with Mr Le on 14 February 2012, which party was intended as an engagement party, however she denies that she slept with Mr Le at her parents' home as alleged by Mr Le. When she returned to Australia she tried to call Mr Le many times and he would not answer her calls so she became suspicious about his intentions and began to think he was just trying to enter Australia for permanent residency and did not want to be in a permanent relationship with her. At this time she was developing a relationship with Mr Vo, which she realised in comparison to Mr Le, was a real relationship. In early March 2012 she met Mr Le's sister in Australia and told her that she was withdrawing her sponsorship of Mr Le. Mr Le's sister was threatening to her if she did not go ahead with the sponsorship. She continued to ring Mr Le but could not get through. At this time she and Mr Vo made a decision to live together and

⁴ Pursuant to section 359AA of the Act.

commenced living together on 20 March 2012 and have been living together since. Her paternal grandmother told her that if they were going to live together they needed to have a ceremony to introduce themselves to relatives and friends as a couple. An engagement ceremony was organised, with her maternal grandparents, at a restaurant in Brisbane, on 8 September 2012. Ms Nguyen and Mr Vo then travelled to Vietnam together on 1 December 2012 to introduce each other to their respective families in Vietnam. An engagement ceremony was organised in Vietnam for 22 December 2012. During this visit to Vietnam, Ms Nguyen also met with Mr Le to finally notify him that she was completely withdrawing her sponsorship. He showed his disappointment and anger but they did not meet again and she thought that she was released. She and Mr Vo then celebrated their marriage in Australia on 22 May 2013. When she was back in Australia, she tried to obtain her original Australian Citizenship Certificate back from Mr Le's sister but she would not return it and ultimately Ms Nguyen had to have the certificate reissued by the Department. When she sought advice in relation to being a sponsor for her husband, Mr Vo, her agent told her that she needed to officially lodge her withdrawal of sponsorship for Mr Le, which she did on 3 May 2013, prior to her marriage to Mr Vo. She later found out that Mr Le had proceeded and lodged a partner application, with her as sponsor, on 13 November 2012. The documents utilised were false as she had signed them in January 2012, although the documents were not dated at the time, and a later date, in November 2012, was inserted without her knowledge.

40. The Tribunal had a number of concerns about the intertwining of the times of Ms Nguyen's relationships with Mr Le and Mr Vo. The Tribunal covered these matters at length with Ms Nguyen at hearing. The Tribunal was satisfied as to the explanations provided by Ms Nguyen both in her evidence to the Tribunal and in the statutory declaration provided after the hearing. In particular the Tribunal accepts that Ms Nguyen signed forms in support of Mr Le's visa application in early 2012 but did not date those forms. The Tribunal accepts that a later date was subsequently inserted in those forms by another person. Whilst Ms Nguyen's actions in signing undated forms were not wise, the Tribunal accepts Ms Nguyen's evidence as to what has occurred. The Tribunal is satisfied that Ms Nguyen and Mr Vo were initially friends and that their relationship changed upon Mr Vo's divorce from his wife in February 2012, with Ms Nguyen and Mr Vo then committing to a long-term committed relationship together and moving in to live together on 20 March 2012.
41. At hearing, both parties told the Tribunal that it was their wish to have their own children together, and preferably initially a son. Subsequent to the hearing, the Tribunal received a doctor's certificate from Ms Nguyen confirming her pregnancy with an expected due date of 17 July 2016. Whilst Ms Nguyen's pregnancy postdates the time of the visa application, the Tribunal may have regard to later events in relation to an earlier point in time, so long as the later events tend logically to show the existence or non-existence of facts that existed at the time of application: *Bretag v MILGEA* (Federal Court, unreported, O'Loughlin J, 29 November 1991). The Tribunal is satisfied that the evidence of Ms Nguyen's now pregnancy to Mr Vo gives weight to Ms Nguyen and Mr Vo having a genuine and long-term commitment to each other at the time of the visa application on 7 January 2014. Taken together with their marriage on 22 May 2013, and the other circumstances of the relationship, the Tribunal is satisfied that at the time of the visa application the parties had a significant commitment to each other.
42. Having taken all matters into account, including the regulation 1.15A matters, the Tribunal is satisfied that at the time of the visa application Ms Nguyen and Mr Vo had a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship between them was genuine and continuing and that they did not live apart on a permanent basis. The Tribunal is therefore satisfied that the requirements of subparagraphs 5F(2)(b)-(d) are also satisfied.

43. As the requirements of subparagraphs 5F(2)(a)-(d) have all been met, the Tribunal is satisfied that at the time of application Ms Nguyen and Mr Vo were in a married relationship and therefore Mr Vo was the spouse of Ms Nguyen pursuant to section 5F of the Act. The Tribunal therefore finds that the requirements of clause 309.211 were met at the time of application.

44. Issue 2 - Did the clause 309.211 criteria continue to be satisfied at the time of decision?

45. The Tribunal is satisfied that the parties continue to be legally married.

46. The Tribunal accepts the evidence of the parties that since lodgement of the visa application they have continued to live together with Mr Vo's son, that they continue to share finances, that they continue to be recognised by family and friends as a married couple in a genuine relationship and that they continue to socialise with family and friends. Further, the Tribunal accepts that Ms Nguyen and Mr Vo are now expecting their first child together in July 2016.

47. Having heard from both of the parties, the Tribunal is also satisfied that the parties have consistent future plans together, including if the visa is not granted.

48. Having taken all of these matters into account, the Tribunal is satisfied that Ms Nguyen and Mr Vo continue to have a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship between them is genuine and continuing and that they do not live apart on a permanent basis.

49. The Tribunal is therefore satisfied that the requirements of subparagraphs 5F(2)(a)-(d) continue to be met at the time of decision, that is that Ms Nguyen and Mr Vo continue to be in a married relationship and Mr Vo continues to be the spouse of Ms Nguyen pursuant to section 5F of the Act.

50. It follows that the clause 309.211 criteria continue to be satisfied at the time of the decision.

51. The Tribunal acknowledges the delegate's concerns, including as regards Ms Nguyen's relationship with Mr Le, however having had the benefit of hearing detailed sworn evidence from both parties, and having explored various concerns at length, for the reasons already stated, the Tribunal is satisfied that the requirements of subdivision 309.211 were satisfied at the time of the visa application and the time of decision. Clause 309.221 is therefore also met.

52. Conclusion

53. The secondary applicants are reliant upon a determination about the spousal relationship to satisfy the secondary criteria. There has been no specific determination on the secondary criteria so the matter will be remitted to the Minister to allow further determination of all the visa applications with a specific direction in relation to the first-named visa applicant. The appropriate course is to remit the application to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

The Tribunal remits the applications for a Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first-named visa applicant meets the following criteria for a Subclass 309 (partner (Provisional)) visa:

- Clause 309.211 of Schedule 2 to the Regulations.

- Clause 309.221 of Schedule 2 to the Regulations.

Susan Trotter
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).